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August 5, 2008

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RE: *Keller Trucking Fuel Spill (CWA-08-2008-0013 & RCRA-08-0006)*

Dear Ms. Inman and Ms. Morris:

On behalf of my client, Keller Transport, Inc., we are submitting this letter in an effort to urge your agency to approve – in addition to the other remediation activities – the mass excavation alternative identified by Environmental Partners, Inc. ("EPI") in its Final Work Plan dated July 28, 2008. After meeting with EPI and the homeowners, as well as discussing this option with my client, we are firmly convinced that mass excavation during this construction season, coupled with the other remediation, is the most cost-effective and timely option.

Based upon EPI's investigation, 3,050 gallons of the unaccounted for fuel sorbed to soil in a central and relatively confined area thirty feet from the lakeshore on the Kohler and Jones properties. These hydrocarbons and soils are relatively shallow and readily accessible using standard excavation methods. As part of its overall work plan, EPI believes that the best approach to these impacts is mass excavation simultaneously with the trench installation, which in and of itself is an excavation project. This approach has the following benefits:

- Mass excavation in 2008 results in an immediate capture of about 60 percent in the spilled fuel. Given the delay in remediation that has occurred as a result of the change in insurers and contractors, the homeowners are understandably frustrated and want immediate and visible progress. The mass excavation would provide that as well as providing immediate environmental benefits.

Mass excavation in 2008 significantly limits the disturbance to the homeowners. It is our understanding that EPA agrees that this area will eventually have to be excavated; however, prefers to leave these soils in place for now, treating them in a yet to be determined manner. However, installation of the trenching called for in the work plan will already result in significant disturbance to the yards of the homeowners. Conducting the mass excavation at the same time as the trenching would hopefully limit that disturbance to a single instance.

Furthermore, landscaping could not be replaced during the period the hydrocarbon-saturated soils are left in place, as the remaining fuel compounds would kill the vegetation. This would mean that, at least for the Arnolds, Kohlers and Joneses, their lives would not return to any semblance of normalcy for some time. While Keller understands that there is no “quick fix” and it could be years before the site meets closure standards, it is hoped that the most of the remediation can be undertaken up front and long term remediation (i.e. ground water treatment) accomplished in an un-intrusive manner. It is of the utmost concern of Keller that these homeowners are able to expeditiously return to enjoying their properties, similar to how they did prior to the spill, and remediation be conducted in a way that will cause the least disturbance to their daily lives in the future.

- Mass excavation in 2008 appears to be preferred by the homeowners who have the most at stake. At the recent Homeowners’ Association meeting, Mrs. Jones personally conveyed to me that she wanted those soils immediately removed from her property. I have heard similar endorsements from other homeowners and I understand that the Homeowners’ Association recently wrote to you endorsing EPI’s proposal. In fact, a question was raised at the meeting whether the excavation could still take place in 2008 if the affected homeowners gave the requisite permission. However, it is our understanding that EPA has indicated that it will actually order that no excavation take place in 2008. This puts Keller in an obviously difficult position, where it cannot attend to the needs and desires of the homeowners who have state law tort claims without incurring potential liability for administrative penalties from the EPA under federal law.
- Mass excavation in 2008 is the most cost-efficient. EPI estimates that the cost of mass excavation this year is approximately \$250,000 to \$300,000. With increases in fuel costs, delaying excavation will be considerably more in the future. At the same time, insurance proceeds dwindle. Also, leaving those saturated soils in place and conducting additional pumping and treatment will result in considerable increases in maintenance and cost to the treatment facility due to higher influent concentrations. As an example, every time the carbon adsorption units are replaced it costs \$80,000. Although it has not been looked at in any detail, my experience with bioremediation is that it also can be fairly expensive and requires an extended timeframe to achieve the desired results, especially when the initial concentrations are very high. It is highly likely that excavation of these soils will still be required at some point in the future, as EPA concedes. There would seem to be no reason to incur these

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additional costs when excavation can address these impacts immediately and permanently. On just a simple per-gallon basis, excavation now provides the greatest “bang-for-the-buck.”

- Mass excavation in 2008 provides greater protection to the public, particularly the effected homeowners. As excavation immediately removes 60 percent of the spilled fuel mass, and significantly reduces any risk from long-term exposure. I understand that a concern was raised that, if the excavated area became re-contaminated, the area could release vapors. However, this is actually a rationale for conducting the excavation now as proposed by EPI. There is currently a similar vapor risk from the 3,050 gallon-equivalent of fuel present and removing that volume of fuel can only benefit the environment and reduce risks to both human health and the environment. Under the work plan, EPI would cap the backfill with clay and visqueen, which should eliminate escaping vapors in the case of re-contamination. EPA’s approach would leave the currently hydrocarbon-saturated soils in place with no such cap. EPA has also expressed concern that any backfill in this area might become recontaminated through ground water migration. While EPI has acknowledged this concern, the current plan provides for the placement of backfill material that will not sorb hydrocarbons and will allow them to pass through the backfill and into the collection trench system. If residual impacts do remain in soil, the presence of pea gravel fill will simplify in situ treatment without additional excavation. EPI has indicated that, in its experience, recontamination of pea gravel backfill from the observed ground water impacts upgradient of the excavation area will not represent as much risk or potential cost to the project as delayed excavation.

To date, I have not heard a single reason rationally based on public health why mass excavation in 2008 should not take place. No one has raised any concern that the mass excavation could result in a further release into the lake. The primary mission of the EPA is to protect public health and the environment. If the homeowners prefer mass excavation in 2008 as more protective of their health, and it would not result in any greater risk of release to the lake than treating the saturated soils in situ, what other segment of the “public” is EPA protecting by ordering that excavation not take place? It is not clear to Keller or the homeowners how immediate removal of 3,050 gallon-equivalents of gasoline from the site does not provide an overriding environmental and public health benefit.

Instead, it is my understanding that EPA’s primary concern with conducting the mass excavation now is that the area may become re-contaminated as the dissolved-phase gasoline continues to migrate and excavation might have to be conducted twice. That’s an issue of logistics and costs, not public health. In any event, EPI proposes to backfill the area with washed pea gravel, which unlike the current soils, should be porous and result in the gasoline passing through and collected in the interceptor trench. While not eliminating the risk of re-contamination, it significantly reduces it to a very acceptable level. Moreover, a second excavation is just that – a risk. However, given that the area has to be excavated anyway for the interceptor trench, EPA’s approach guarantees a second excavation.

It is Keller’s concern that the EPA may be elevating an institutional preference for a high-tech approach to this spill that takes longer over the individual preferences of the homeowners and the

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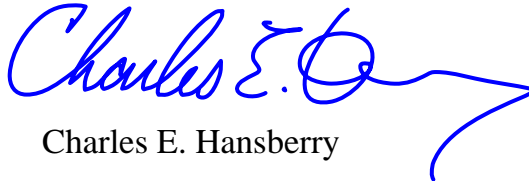
economic realities of the overall situation. The insurance proceeds not only have to fund the remediation, they also have to fund settlements with homeowners and other claimants. Moreover, Keller would prefer to negotiate those settlements promptly, but cannot if the future cost of excavation and remediation is unknown. Neither Keller nor these homeowners have the luxury to experiment on an in-situ approach that may take years to yield substantive results.

We hope that EPA seriously re-considers this direction in light of Keller and the homeowners' preferences for mass excavation in 2008. The Administrative Clean-up Order was issued, in part, under 33 U.S.C. § 1321, which requires that the government and others participating in the clean-up comply with the National Contingency Plan at 40 C.F.R. § 300 *et seq.* 33 U.S.C. § 1321(c)(3)(A). Under the NCP, On Scene Coordinators are to "ensure that all appropriate public and private interests are kept informed and that **their concerns are considered throughout the response.**" 40 C.F.R. § 300.135(n); 40 C.F.R. § 300.155(a) (emphasis added). The OPA also mandates such consideration. 33 U.S.C. § 2706(c)(5).

We look forward to discussing this issue in greater detail with you on the conference call currently scheduled for August 6, 2008.

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP



Charles E. Hansberry

CEH:amt